Order

Michigan Supreme Court
Lansing, Michigan

August 9, 2006

ADM File No. 2003-47

Administrative Order No. 2006-6
Prohibition on "Bundling" Cases

On order of the Court, the need for immediate action having been found, the following Administrative Order is adopted, effective immediately. Public comments on this administrative order, however, may be submitted to the Supreme Court Clerk in writing or electronically until December 1, 2006, at: P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-47. Your comments will be posted, along with the comments of others, at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

The Court has determined that trial courts should be precluded from "bundling" asbestos-related cases for settlement or trial. It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery. This order in no way precludes or diminishes the ability of a court to consolidate asbestos-related disease personal injury actions for discovery purposes only.

For purposes of this Administrative Order, "asbestos-related disease personal injury actions" include all cases in which it is alleged that a party has suffered personal injury caused by exposure to asbestos, regardless of the theory of recovery.

Staff Comment: This Administrative Order prohibits the practice of "bundling," or joining, asbestos-related personal injury actions in order to maximize the number of cases settled. The order does not, however, preclude consolidation for discovery purposes.

The purpose of this order is to ensure that cases filed by plaintiffs who exhibit physical symptoms as a result of exposure to asbestos are settled or tried on the merits of that case alone. Bundling can result in seriously ill plaintiffs receiving less for their claim in settlement than they might otherwise have received if their case was not joined with another case or other cases.

The order is designed to preclude both the practice of settling cases in which plaintiffs with symptoms and plaintiffs without symptoms are settled together, as well as the practice of settling cases in which the plaintiffs are similarly situated (either with or without symptoms allegedly related to asbestos exposure.)

The staff comment is not an authoritative construction by the Court.

MARKMAN, J. (*concurring*). This Court, having conducted two public administrative hearings on asbestos litigation, and having considered for more than three years whether, and how, to respond to such litigation, I join fully in this administrative order for the following reasons: (1) unlike other remedial proposals, such as the establishment of an inactive asbestos docket, I believe that this "antibundling" administrative order indisputably falls within the scope of our judicial powers; (2) this administrative order will, in my judgment, help to restore traditional principles of due process in asbestos cases by ensuring that they are resolved on the basis of their individual merit, and that they do not serve merely as "leverage" for the resolution of other cases; (3) this administrative order will, I believe, advance the interests of the most seriously ill asbestos plaintiffs whose interests have not always been well served by the present system, where available funds for compensation have been diminished or exhausted by payments for claims made by less seriously ill claimants, Behrens & Lopez, *Unimpaired asbestos dockets*, 24 Rev Litig 253, 259-260 (2005); (4) at our most recent public administrative hearing on May 6 of this year, all who spoke agreed that each claim should be decided on its own merits and that serious claims should not be used to leverage settlements in less serious cases; and (5) this administrative order will better enable the Legislature, which is considering asbestos litigation, to undertake an assessment of the true costs of asbestos litigation. At present, these costs have been camouflaged by the "bundling" process, at the expense of fundamental due process rights.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). For some time this Court has had on its administrative agenda consideration of the adoption of a docket-management system for asbestos-related litigation. We are also well aware that the Legislature is considering legislation in connection with this area. Today, before knowing what long-range plan or system, if any, is appropriate for this area of litigation, the Court, putting the cart before the horse, reaches out and meddles with the settlement practices currently in place. The comments the Court has thus far received do not evidence any crisis-proportion problems[1] and the true resulting costs to the system of today's order remain unknown. Accordingly, I cannot agree with this order.

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[1] Just two months ago, the Court received the following comment from an assistant general counsel for Consumers Energy Company:

> I write in response to the Proposed Administrative Order regarding Asbestos-Related Disease Litigation that was published in the Michigan Bar Journal I received in today's mail. I am an Assistant General Counsel of Consumers Energy Company in charge of litigation. I have personally handled more than 180 asbestos cases on behalf of Consumers Energy Company. We do not support either alternative in the proposed Administrative Order. There are already sufficient safeguards in place to avoid fraudulent claims based on the information that a plaintiff is required to produce in

WEAVER, J. (*dissenting*). I dissent from the precipitous adoption of this "antibundling" order, which precludes "bundling" of asbestos-related cases for settlement and trial purposes. This haste, without sufficient information, is unrestrained and unwise.

"Bundling" refers to the trial court procedure of grouping asbestos cases together for trial and settlement purposes, using stronger cases as leverage to settle cases grouped together.

The Court does not know enough about how this "antibundling" order will affect current trial court operations, particularly in Wayne County and other counties from which asbestos-related cases originate. The Court needs to be certain that the attempted solution to due process concerns does not create even greater due process concerns and other problems.

It is undisputed that adopting this "antibundling" order will increase the number of asbestos cases that are litigated, as opposed to settled. Judge Robert J. Colombo, currently the only circuit judge in Michigan who hears asbestos-related cases, has informed this Court that, in his opinion, adopting any "antibundling" order will require 10 additional judges to handle the increased caseload.

If the "antibundling" order does require 10 additional judges, it would represent a significant financial burden on the state and on Wayne County. The majority has not addressed how the increased caseload will be financed, or who will bear the increased financial burden.

Further, the majority has not addressed how the increased caseload will be managed. Judge Colombo has asserted that 10 new judgeships would be needed. The majority has not addressed how 10 new judgeships would be created and funded. Even if the 10 new judgeships are created, the majority has not addressed how the increased caseload would be managed during the minimum of at least one year that it would take to create and implement new judgeships. Finally, the majority has not addressed how the increased caseload will be managed if those new judgeships are not created.

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discovery in every case (social security records, medical diagnosis, standard interrogatory answers etc.). The proposed Administrative Order would in our view create a quagmire and accomplish little. In slang terms, this is an example of "if it ain't broke—don't fix it". I also find the Proposed Administrative Order to be quite surprising from this Michigan Supreme Court. It strikes me as going way beyond a procedural matter and looks an awful lot like judicial legislating.

Currently, the asbestos docket represents one quarter of one judge's docket. The dockets of the other 68 judges in Wayne Circuit Court and Wayne County Probate Court handle the civil, criminal, and child and family cases.

The majority order cites "fundamental due process rights" in asbestos cases as a reason to immediately implement the "antibundling" order. But determining whether asbestos litigants' due process rights have been violated requires a complex and in-depth analysis, rather than simply stating, as the majority does, that rights have been violated.

Further, the immediate increase in the asbestos docket will affect the distribution of court resources, including the trial judges' time spent on all other cases. There will be fewer resources available for civil, criminal, and child and family cases, because the resources will be diverted to manage the new increased asbestos docket. Depriving civil, criminal, and child and family cases the proper resources to adjudicate them could create its own new set of due process problems.

It is true that this Court has had an administrative file on the asbestos docket open for more than three years. However, the information submitted by Judge Colombo, that, in his opinion, precluding bundling would increase the caseload so as to require ten additional judges, was only recently made available.

This Court should have further investigated the issues surrounding, and the potential effects of, any "antibundling" order before issuing this order.

Even though this Court has had the file on asbestos issues open for over three years, by immediately adopting this "antibundling" order, this Court is acting precipitously, without restraint, and therefore unwisely.

KELLY, J. (*dissenting*). Today's decision to outlaw the bundling of asbestos-diseases cases in Michigan courts is both ill-advised and indefensible. The decision purports to restore due process to litigants. It does not. Instead, it makes a mockery of due process and creates serious problems. It virtually ensures that justice will be so delayed for many diseased plaintiffs that they will never live to see their case resolved. It promises to force a sizable and needless increase in the funds required to operate the circuit courts at a time when the state's economy is far from robust. And, until new funds have been raised, unbundled asbestos-diseases cases will clog our courts' dockets. The congestion will bring with it years of delay to individuals sick and dying of work-related lung diseases.

It is not merely plaintiffs who will be burdened by the newly created problems. Unbundling will increase the cost to Michigan businesses of defending asbestos-diseases claims that they believe to be baseless. Reliable expert information and unrebutted statements to this Court project that unbundling in Michigan will require the addition of

at least ten new circuit court judges. The cost to taxpayers will be in the millions of dollars. And delays of four to six years will occur in resolving asbestos-diseases cases pending the addition of these new judges. Given the benefits of the current system to both sides and to the taxpayers of the state, I would retain it.

The current system functions in this manner: A judge groups asbestos-diseases cases on the basis of a commonality among them. For instance, cases in which the plaintiffs claim harmful exposure to asbestos in one workplace are grouped together. The judge then tries one claim that is representative of the group. The results of the trial are extrapolated to the rest of the claimants. The extrapolation provides a remedy for all deserving claimants in the group, not just the most seriously ill. The effect is that almost all claims in the group are settled without the time and expenses engendered if each were to receive a full trial. It efficiently allows the court to resolve large numbers of cases in a short time. Claimants obtain a recovery more quickly than traditionally, and defendants save the expense of numerous trials.

Critics of this system claim that bundling can result in seriously ill plaintiffs receiving less for their claims in settlement than they might have received in an individual trial. Proponents of the system respond that, in traditional settlements or trials, most plaintiffs, especially those suffering from serious injuries, recover only a fraction of their actual losses.[1] Critics insist that the current system permits part of the finite amount of funds available for diseased claimants to go to the less seriously injured. Proponents respond that the amount of settlement monies going, perhaps needlessly, to those less seriously injured is more than offset by the savings in litigation expenses occasioned by bundling.

[1] Hensler, *Symposium: Conflict of laws and complex litigation issues in mass tort litigation: Resolving mass toxic torts: Myths and realities,* 1989 U Ill L R, 89, 101 (1989).

Critics also assert that bundling violates due process requirements. But the Ninth Circuit Court of Appeals has reached the opposite conclusion. It approved bundling, finding that it complies with due process requirements.[2] In fact, some legal scholars believe that, in the handling of these cases, claimants will lose, not regain, their due process rights if judges are unable to bundle them.[3] Nonetheless, today the Michigan Supreme Court has apparently rejected the Ninth Circuit's reasoning. Justice Markman explicitly concludes that this administrative order helps to restore "traditional principles of due process."

One can only express dismay at the majority's decision to prohibit the bundling of asbestos-diseases cases in Michigan. Rather than restore due process as it pretends, the order seems designed to precipitate a crisis. The existing system has functioned reasonably well for years. And there is no indication that future problems will arise with it. Asbestos-diseases cases are not increasing in number and are not expected to increase in our state. But today's Supreme Court order will create an inability of the courts to resolve them expeditiously. For what purpose?

[2] *Hilao v Estate of Marcos*, 103 F3d 767, 786-787 (CA 9, 2004).

[3] See Saks and Blanck, *Justice improved: The unrecognized benefits of aggregation and sampling in the trial of mass torts*, 44 Stan L Rev 815, 839 (April, 1992).

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 9, 2006

Clerk